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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 554

JACK PRINCIPALE,

Petitioner,

vs.

GENERAL PUBLIC UTILITIES CORPORATION, as successor to Associated Gas and Electric Company and Associated Gas and Electric Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ALLEN E. THROOP, *Attorney for* General Public Utilities Corporation, As Successor to Associated Gas and Electric Company and Associated Gas and Electric Corporation,

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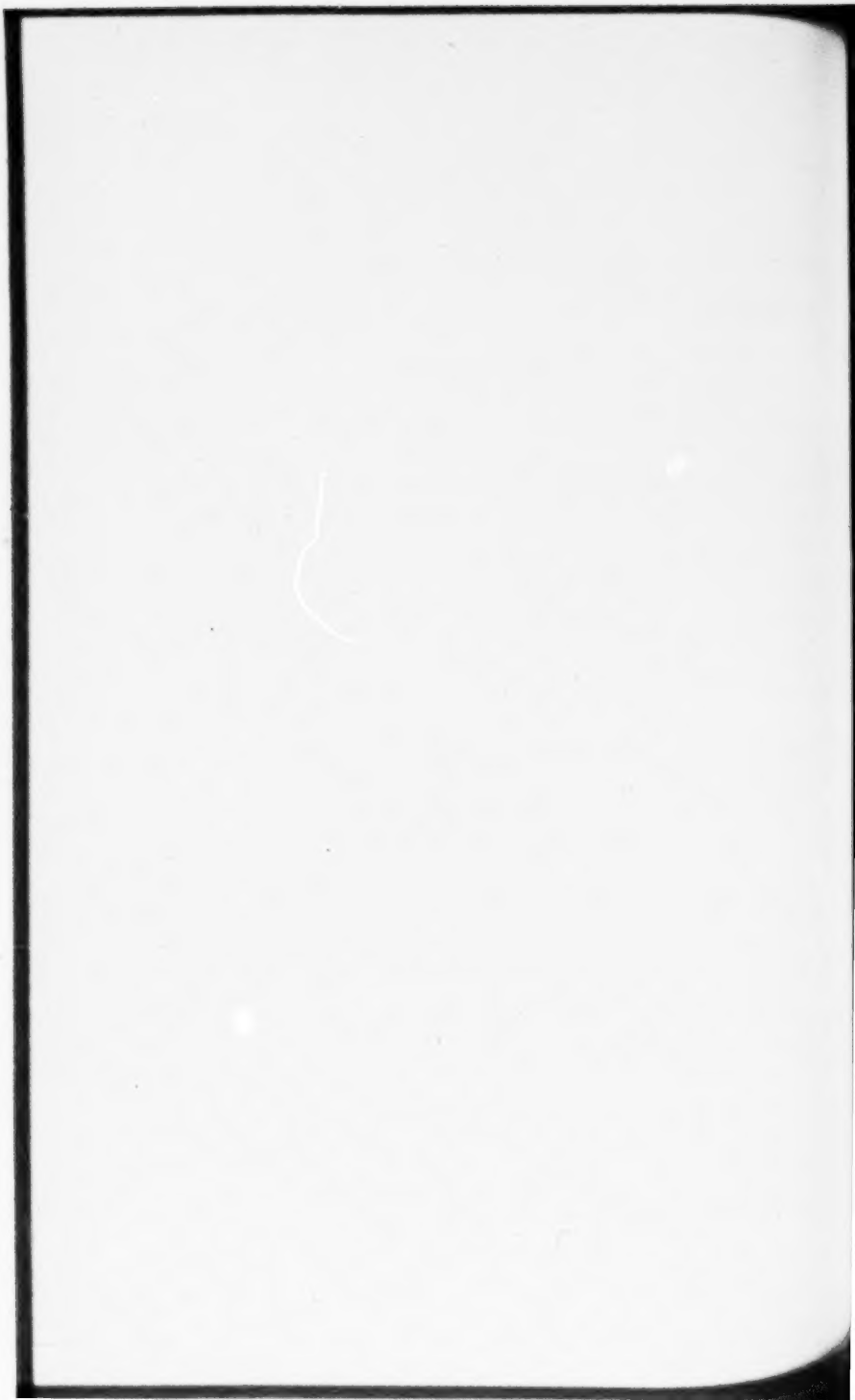

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Opinions Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 15-16) is reported in 164 F. (2d) 220.

The Opinion of the United States District Court for the Southern District of New York (R. 5a-12a) is reported in 71 F. Supp. 538.

Jurisdiction

Jurisdiction of this Court is apparently invoked by the Petitioner under Sec. 24(a) of the Judicial Code, 28 U.S.C.A. 347(a). The judgment of the Circuit Court of Appeals was dated November 20, 1947. The Petition for a Writ of Certiorari was filed on January 29, 1948.

Statement

(a) Nature of the Controversy

This controversy arises in proceedings for the reorganization of Associated Gas and Electric Company (herein called "Ageco"), pursuant to Chapter X of the Bankruptcy Act.[1]

The issue is whether the Petitioner is entitled to participate under the terms of the Plan of Reorganization as owner of certain Ageco 6% Convertible Obligations, certain shares of Ageco $7 Dividend Series Preferred Stock and certain Ageco 7% Convertible Obligations. The Order of the United States Circuit Court of Appeals affirmed an Order of the District Court which in turn affirmed an Order of a Referee in Bankruptcy denying the claim of the Claimant to participate under the Plan of Reorganization as owner of said securities.

(b) The Plan of Reorganization

The Plan of Reorganization provided for the reorganization of Ageco and of its subsidiary, Associated Gas and Electric Corporation. It provided that all securities issued by said subsidiary should be entitled to participate under the Plan. The Plan provided for participation by certain

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[1] A Petition of Ageco for its reorganization under Chapter X of the Bankruptcy Act was filed and approved January 10, 1940 and proceedings for its reorganization were conducted in the District Court of the United States for the Southern District of New York before District Judge Vincent L. Leibell. A Plan of Reorganization of Ageco, approved by the Securities and Exchange Commission under Section 11(f) of the Public Utility Holding Company Act of 1935 (Release No. 4985) by Order (Docket No. 52-22) dated April 14, 1944, was approved and confirmed by said District Court by Orders entered September 15, 1944 and August 10, 1945, respectively. Pursuant to the Order of said District Court dated January 10, 1946, said Plan of Reorganization was on January 14, 1946 consummated as of January 1, 1946.

Ageco securities and excluded the remaining Ageco securities. However, certain of the excluded securities, but only in the hands of certain holders, were allowed participation under the Plan pursuant to the provisions of Item 8 of Paragraph 6 of Article II of the Plan (R. 4a). Participation was allowed under such item to

> "8. Such of the following securities of Ageco as were issued in exchange for the securities enumerated in Item 7[2] and as remain in the hands of Original Holders:
>
> 7% Convertible Obligations due 2002, Series A
> 6½% Convertible Obligations due 2002, Series A
> 6% Convertible Obligations due 2002, Series A
> 6% Convertible Obligations due 2002, Series B
> $6 Dividend Series Preferred Stock
> $6.50 Dividend Series Preferred Stock
> $7 Dividend Series Preferred Stock
> $6 Cumulative Preference Stock"

The phrase "Original Holder" which appears in Item 8, quoted above, is defined in the Plan (R. 4a), as follows:

> "Original Holders: Persons to whom Convertible Obligations of Ageco due 2002, 6%, 6½% and 7% issues of Series A and 6% issue of Series B or Ageco preferred and preference stock were originally issued in exchange for Ageco Convertible Debenture Certificates, 6½% Series B and C (Manila Series), 6% Series, A, B, C, D, E, F, Series B of 1929, or 1931 Series, or their personal representatives, legatees or distributees, or statutory successors."

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[2] The securities enumerated in Item 7 consist of various issues of Convertible Debenture Certificates and one issue of Convertible Debenture Obligations, all of which are herein collectively referred to as "Convertible Debenture Certificates".

(c) Petitioner's Claim

Petitioner claims to be entitled to participate under the Plan of Reorganization as the holder of certain securities which are of the issues enumerated in the above quoted Item 8 of the Plan. He made none of the exchanges referred to in the above quoted definition of the phrase "Original Holders". As a matter of fact, Petitioner testified he was never the owner of any Convertible Debenture Certificates. Petitioner had no dealings with Ageco. If Petitioner has any claim it must be a claim which he acquired by virtue of his purchase in the market of his securities under the standard form of assignment which was endorsed upon the back of his certificates. The form of assignment appears in the opinion of the District Judge which is reproduced at pages 9a-10a of the Appendix to Petitioner's Brief.

(d) The Findings of the Referee

The District Court Order affirmed an order of Honorable John E. Joyce, Referee in Bankruptcy, dated February 6, 1947, which disallowed the claim of the Petitioner.

The Referee in his Order disallowing the claim made certain specific findings of fact (R. 9a), *inter alia,*

"FINDINGS OF FACT

3. The claimant acquired all of the securities upon which he founds his claim, by purchases in the open market in or during and subsequent to the year 1939.

4. None of the securities which are the subject of the notice of this hearing was acquired by the claimant in exchange for any of the securities of the Debtor listed in subdivision 7 of paragraph 6 of the Plan of Reorganization."

(e) Petitioner's Brief

If Petitioner's brief can be said to contain points which bear upon the controversy, such points relate to Petitioner's contention that he is a personal representative or a statutory successor of Original Holders. No attempt will be made in this brief to discuss the extraneous matter that constitutes the major part of Petitioner's brief, other than to make the comment that the history of the reorganization proceedings in the courts makes indubitably clear the fact that the fairness of the Plan of Reorganization has heretofore been fully passed upon and is no longer a matter for review by this Court. In this connection this Court is respectfully referred to the opinion of the Circuit Court of Appeals for the Second Circuit in *Elias* v. *Clarke*, 143 Fed. 2d. 640. The classification order of the District Court which was reviewed by the Circuit Court of Appeals in *Elias* v. *Clarke* provided in paragraph 1 as follows:

> "a. Holders of Ageco Convertible Obligations, Series A and B, due 2002 (excepting persons to whom such Ageco Convertible Obligations, Series A and B, were originally issued in exchange for Convertible Debenture Certificates, 6½% Series B and C (Manila Series), 6% Series, A, B, C, D, E, F of 1929, and 1931 Series, and 6% Convertible Debenture Obligations, Series F, and who still hold the Convertible Obligations issued to them or their personal representatives, legatees, or distributees, or statutory successors), be and hereby are classified as holders of securities junior and subordinate, both as to principal and interest, to the general creditors of Ageco, except holders of obligations convertible at Ageco's option into stock.
>
> b. Holders of Ageco $7 Dividend Series Preferred Stock, $6.50 Dividend Series Preferred Stock, $6 Cumulative Preference Stock, $5 Dividend Series Preferred Stock, $5.50 Dividend Series Preferred

Stock, and $6 Dividend Series Preferred Stock (excepting persons to whom such stock was originally issued in exchange for Convertible Debenture Certificates, 6½% Series B and C (Manila Series), 6% Series A, B, C, D, E, B of 1929, and 1931 Series, and 6% Convertible Debenture Obligations, Series F, and who still hold the stock so issued to them, or their personal representatives, legatees or distributees, or statutory successors), be and hereby are classified as holders of Preferred and Preference Stock of Ageco."

The Opinion of Circuit Judge Clarke in *Elias* v. *Clarke* is singularly pertinent to the instant application. Judge Clarke stated at page 644 of 143 Fed. 2d:

> "(3, 4) Turning, therefore, to the merits, we find ourselves initially in accord with the view that under the governing New York law a claim for fraud or misrepresentation in connection with an obligation evidencing a debt, whether for damages or for rescission, does not pass merely with the transfer of the obligation itself, where there are lacking special words of assignment of the claim. Here the bonds were transferred upon execution of a usual and stereotyped form of bond transfer, found on the back of the certificate, which only purported to assign and transfer 'the within Convertible Obligation.' That this is insufficient as an assignment is the precise holding of Abel v. Paterno, 245 App. Div. 285, 281 N.Y.S. 58, and is the substantial effect of a series of cases in the Court of Appeals involving various claims against trustees for bondholders for different forms of wrongful acts, cases of which the latest is Smith v. Continental Bank & Trust Co. of New York, 292 N.Y. 275, 54 N. E. 2d, 823, and which we discussed at some length in Manufacturers Trust Co. v. Kelly, 2 Cir. 125 F. 2d 650, certiorari denied 316 U.S. 697, 62 S. Ct. 1293, 86 L. Ed. 1766."

Following the denial by the Supreme Court of the United States (323 U.S. 778) of an application for a writ of certiorari to this Court's determination in the above-mentioned case of *Elias* v. *Clarke,* another attack was made by the same group of non-original holders and their associates upon the Plan of Reorganization. The second attack was based upon the general premise that the Plan was unfair and defective in various respects. The Circuit Court of Appeals (149 Fed. 2d. 996) affirmed the District Court's ruling (61 Fed. Supp. 11) that the Plan was fair. The Supreme Court of the United States again denied the application of the same appellants for a writ of certiorari (326 U.S. 736).

The Circuit Court of Appeals in passing upon the fairness of the Plan, 149 Fed. 2d. 996, at page 1007, stated that:

> "Original holders of COs received their bonds in exchange for CDCs, and are granted participation in the assets on the theory that they may have a claim for rescission or damages based on fraud or misrepresentation in connection with the exchange. The statement in the case of Elias v. Clarke that under the New York law 'a claim for fraud or misrepresentation in connection with an obligation evidencing a debt * * * does not pass merely with the transfer of the obligation itself, where there are lacking special words of assignment * * * ; forecloses non-original holders of COs, of whatever series, from asserting any such claim.' "

After the expiration of time to seek review of the various orders holding the Plan to be fair, requiring claims to be filed or be barred and generally administering the estate of Ageco, the District Court directed by Order dated January 10, 1946, the Plan to be consummated and, pursuant thereto, the Plan was on January 14, 1946 duly consummated as of January 1, 1946.

Question Presented

In the instant case the Circuit Court of Appeals decided that the facts conclusively establish that the Petitioner is not entitled to participate under the terms of the Plan of Reorganization. In arriving at this conclusion the Circuit Court of Appeals for the third time gave effect to the provisions of the Plan excluding non-original holders of securities such as the Petitioner owns, the validity of which is no longer properly the subject of review. *Elias* v. *Clarke,* 143 F. (2d) 640, 644, cert. denied 323 U.S. 778; *In re Associated Gas & Electric Co.,* 149 F. (2d) 996, 1007, cert. denied sub nom. *Elias* v. *Clarke,* 326 U.S. 736; *Principale* v. *General Public Utilities Corporation,* 164 Fed. (2d) 220.

The question presented is whether the Circuit Court of Appeals erred in its determination.

ARGUMENT

Petitioner is not entitled to participate under the terms of the Plan of Reorganization.

Petitioner had no dealings with Ageco and does not seek participation under the Plan of Reorganization except as the holder of certain Convertible Obligations and Preferred and Preference Stocks. If Petitioner is not entitled to participation under the above quoted Item 8 of the Plan, he is not entitled to any participation.

Petitioner's own testimony establishes that he was not the owner of any Convertible Debenture Certificates and that he acquired his Convertible Obligations and Preferred and Preference Stocks by purchases in the market. Petitioner testified that he is acting only for himself and that any recovery that he effects will be his property and thereby establishes that he is not a personal representative. Peti-

tioner states that he is a statutory successor of persons who made the requisite exchanges. But the phrase "statutory successor" applies only to certain forms of succession to corporate property. There is no showing or claim that there was any succession from any corporation of ownership of any of the securities. The record is singularly barren of any reference to mergers, consolidations or dissolutions of corporations. See Words and Phrases (Perm. Ed., Vol. 40, page 111). See also "Succession", Bouvier Law Dict., 8 Ed. (1914) 3176 and Restatement, Conflict of Laws, Section 161 and Comment (a).

Petitioner devotes part of his brief to a nebulous claim that persons who had made exchanges of Convertible Debenture Certificates for Convertible Obligations had thereby obtained certain fraud claims which in some way devolved upon Petitioner and therefore, Petitioner urges, he is entitled to participation, apparently as some sort of general creditor. There was no fraud in the exchanges (see reference to ruling of the Special Master which is found at page 640 of the Circuit Court of Appeals decision in 143 Fed. 2d). Further, the Circuit Court of Appeals decided that even if there had been fraud in the exchanges, claims based thereon did not pass by the form of assignment under which Petitioner acquired his securities (143 Fed. 2d. at page 644). Even if there were any such claims and Petitioner was entitled to enforce them, such claims would be general claims and all general claims have been barred from participation by various Bar Orders of the District Court.

Conclusion

The decision of the Circuit Court of Appeals is correct and gives effect to the terms of a plan of reorganization which this Court has twice refused to review. Furthermore, the decision is a determination of a question of fact applicable only to particular circumstances and involves no question of general importance and no conflict between decisions of state and federal courts or between federal courts of different circuits. Respondent therefore respectfully requests that the petition for a writ of certiorari be denied.

Dated: February 24, 1948.

Respectfully submitted,

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